Supreme Court, U. S.
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No. 80-142

In the Supreme Court of the United States

October Term, 1980

DAVID S. HAYES,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Brief in Opposition for Respondent The Pittsburgh Press

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Respondent, The Pittsburgh Press, respectfully requests that the Petition of David S. Hayes for a Writ of Certiorari to the Supreme Court of Pennsylvania be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review a state supreme court decision prohibiting the closure of a suppression hearing when defendant admits that the alternative to closure adopted by the state court will fully protect his fair trial right, and the state court therefore expressly finds it unnecessary to resolve the question of what standard is required by the federal and state constitutions in balancing defendant's fair trial right and the public's right of access to suppression hearings.

2. Whether this Court should review a state supreme court decision holding that a suppression hearing could not be closed when an efficient and admittedly effective alternative was available and the state court's decision was based on the adequate and independent "public trial" and "open courts" provisions of the state constitution.

TABLE OF AUTHORITIES

CASES

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CONSTITUTIONAL PROVISIONS

Pennsylvania Constitution, Article I §9 1

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STATUTE

Title 28, United States Code, §1257 (3) 1, 2, 4

RULE OF COURT

Supreme Court Rule 17.1 (c) 5

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court, three concurring opinions and one dissenting opinion, are reported in *Commonwealth v. Hayes,* Pa. , 414 A.2d 318 (1980), and appear in the Appendix to the petition for certiorari. Both the Atlantic Second version of the opinion and the Appendix contain an unofficial synopsis which characterizes the hearing in question as a "pretrial" suppression hearing. In fact, the suppression hearing had been reserved for the start of the trial, with the trial to commence immediately upon the conclusion of the suppression hearing.

No opinion was rendered by the trial court, the Court of Common Pleas of Allegheny County.

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. §1257 (3) because no substantial federal title, right, privilege or immunity is specially set up or claimed by petitioner. Petitioner conceded in argument before the Pennsylvania Supreme Court that his right to a fair trial would be fully protected by the available procedural device, jury sequestration, recommended by The Pittsburgh Press and adopted by the Pennsylvania Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

In addition to the federal constitutional provisions set forth in petitioner's petition for certiorari, the following Pennsylvania constitutional provisions and federal statute are involved.

Article I §9 of the Pennsylvania Constitution provides in pertinent part: "In all criminal prosecutions the accused hath a right to, ... in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he

cannot be ... deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Article I §11 of the Pennsylvania Constitution provides in pertinent part: "All courts shall be open ..."

28 U.S.C. §1257 provides in pertinent part:

> *State courts; appeal; certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Defendant David S. Hayes, who was at the time a Pennsylvania state legislator, was arrested in October, 1979, and charged with sexually assaulting and supplying drugs to a seventeen-year-old male high school student. A motion to suppress evidence filed by Hayes was scheduled by the trial judge to be heard on March 10, 1980, immediately prior to Hayes' trial.

At the start of the suppression hearing, Hayes' counsel, by oral motion concurred in by the prosecution, asked that the hearing be closed to the public and the news media. The trial judge immediately granted defendant's motion. The Pittsburgh Press (hereinafter "The Press"), represented in court both by its attorney and by a news reporter, thereupon moved to intervene and for an open hearing.

The Press suggested that, since the trial was scheduled to commence immediately after the suppression hearing, the

defendant's fair trial right and the public's right of access could be conveniently accommodated by selecting and sequestering a jury and then holding an open suppression hearing. The trial judge allowed The Press to intervene but reaffirmed his closure order, even though at no time did defendant make any effort to demonstrate that he would be deprived of a fair trial by an open suppression hearing.

The trial judge then granted The Press a temporary stay to permit The Press to seek immediate review by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court continued the stay, agreed to exercise plenary jurisdiction, granted permission to all news media representatives to intervene and, on the following day, March 11, heard oral argument on The Press' petition for summary reversal.

At oral argument, counsel for defendant conceded in response to a question from the court that the sequestration procedure suggested by The Press would fully protect his client's right to a fair trial.

On May 1, 1980, the Pennsylvania Supreme Court reversed the trial court's closure order.

In his opinion for the court, Justice Nix held that the public trial provisions of both the federal and state constitutions prohibited closure where an effective alternative means was available to assure defendant's fair trial right. He found that the available jury sequestration procedure, which defendant admitted was an effective alternative in this case, eliminated the need for closure. For this reason, at footnote 9 of his opinion, Justice Nix expressly found it unnecessary to resolve the questions of what standard should be applied in deciding when closure should be ordered and who possessed the burden of persuasion in meeting the standard.

Justice Nix found no support for the claim that the "open courts" provision of Article I §11 of the Pennsylvania Consti-

tution provided a greater right of access than the public trial provisions of the federal and state constitutions.

Justices Larsen and Flaherty, concurring, disagreed with Justice Nix's view of the "open courts" provision of the Pennsylvania Constitution. They took the position that this provision is absolute and that the rights of a defendant can always be adequately protected by procedural devices other than closure.

Justice Kauffman, concurring, also disagreed with Justice Nix's view of the "open courts" provision. Further, he felt that the court should resolve the questions expressly left unanswered by Justice Nix's opinion, namely the standard and burden for deciding when closure should be ordered. Justice Kaufmann took the position that the "open courts" provision and the policies underlying this provision, while not absolute, create a strong presumption in favor of public access to adjudicative judicial proceedings which can be rebutted only by a showing by a defendant that closure is "strictly and inescapably necessary" to protect his fair trial guarantee—adopting the approach defined by Justice Blackmun in his opinion in *Gannett Company v. DePasquale*, 443 U.S. 368, 406-48, 99 S.Ct. 2898, 2921-33, 61 L.Ed. 2d 608, 638-65 (1979).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review a state supreme court decision prohibiting the closure of a suppression hearing when defendant admits that the alternative to closure adopted by the state court will fully protect his fair trial right, and the state court therefore expressly finds it unnecessary to resolve the question of what standard is required by the federal and state constitutions in balancing defendant's fair trial right and the public's right of access to suppression hearings.

ARGUMENT

This Court's jurisdiction under 28 U.S.C. §1257 (3) over a decision by the highest court of a state, depends on the exist-

ence of an issue which involves a claimed federal right. Since defendant admits in this case that his fair trial right will be fully protected by the alternative to closure adopted by the state court, no claimed federal right is at issue and this Court has no jurisdiction over the state court decision.

Supreme Court Rule 17.1 (c) indicates that this Court will grant certiorari when a state court has decided an important question of federal law which has not been settled by this Court. Since in this case the Pennsylvania Supreme Court expressly found it unnecessary to resolve any question of federal law, no state court decision on a question of federal law exists and there is no reason for review by this Court.

The Pennsylvania Supreme Court did decide that a suppression hearing could not be closed when an efficient and admittedly effective alternative was available. This decision was based on the adequate and independent "public trial" and "open courts" provisions of the Pennsylvania Constitution and is not reviewable by this Court.

CONCLUSION

For the foregoing reasons, The Press requests that the Court deny defendant's petition for certiorari.

Respectfully submitted,

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